

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CASE NO. 3:11-CV-477

)
SHAWN MASSEY,)
)
)
Plaintiff,)
)
)
vs.)
)
CHARLOTTE-MECKLENBURG POLICE)
OFFICER J.J. OJANIIT; CHARLOTTE-)
MECKLENBURG POLICE OFFICER)
GERALD J. ESPOSITO; CHARLOTTE-)
MECKLENBURG POLICE OFFICER)
TOM G. LEDFORD; and CHARLOTTE-)
MECKLENBURG POLICE OFFICERS)
JOHN and JANE DOES ##1-10, IN THEIR)
INDIVIDUAL CAPACITIES,)
)
Defendants.)

Motion to Strike Defendants' Exhibits or, In the Alternative, to Convert Defendants' Motions for Judgment on the Pleadings Into Motions for Summary Judgment, and Grant Plaintiff Discovery Prior To Ruling

Plaintiff Shawn Massey, through undersigned counsel, hereby moves this Court, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, to strike and disregard the Exhibits attached to Defendants' Answers and to Defendant Ojaniit and Defendant Ledford's Motion for Judgment on the Pleadings. In the alternative, Plaintiff moves to convert Defendants' motions for judgment on the pleadings into motions for summary judgment, and to allow Plaintiff to conduct discovery relating to the allegations in his Complaint and to supplement his response to

Defendants' motions after such discovery is completed. In support of this motion, Plaintiff shows the Court the following:

1. Between November 18 and November 28, 2011, Defendants each filed an Answer to Plaintiff's Complaint. Attached as Exhibits to those Answers were the following:

- a. Motion to Set Aside Verdicts and Release Defendant
- b. Order (setting aside verdicts and releasing defendant)
- c. Report of JJ Ojaniit dated May 22, 1998
- d. Report of Gerald Esposito dated May 23, 1998
- e. Photo Spread shown to Samantha Wood
- f. Report of JJ Ojaniit dated May 23, 1998
- g. Report of TG Ledford dated May 26, 1998
- h. Warrants for Arrest of Shawn Massey
- i. Indictments of Shawn Massey
- j. Transcript of Shawn Massey Trial

2. On November 28, 2011, each Defendant filed a Motion for Judgment on the Pleadings. Attached as an Exhibit to Defendant Ojaniit's and Defendant Ledford's motions was the 2001 Court of Appeals decision affirming Plaintiff's conviction.

3. Defendants rely extensively upon information contained in these exhibits in support of their respective motions for judgment on the pleadings.

4. Under Rule 10(c) of the Federal Rules of Civil Procedure, a copy of a "written instrument" that is an exhibit to a pleading is a part of the pleading for all purposes.

5. None of the exhibits attached by Defendants to their answers is a "written instrument" as the courts have defined that term. These exhibits, and the exhibit attached to Defendant Ojaniit and Defendant Ledford's motion for judgment on the pleadings, are therefore not a "part of the pleadings" under Rule 10(c).

6. Rule 12(d) of the Federal Rules of Civil Procedure provides as follows:

If, on a motion under Rule 12(b) (6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule

56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Wherefore, Plaintiff respectfully moves this Court for an order striking and disregarding the Exhibits attached to Defendants Answers and to Defendant Ojaniit and Ledford's Motion for Judgment on the Pleadings. In the alternative, Plaintiff moves for an order converting Defendants' motions for judgment on the pleadings to motions for summary judgment, and allowing Plaintiff to conduct discovery relating to the allegations in his Complaint and to supplement his response after such discovery is completed.

RESPECTFULLY submitted this the 31st day of January, 2012.

RUDOLF WIDENHOUSE & FIALKO

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 2012, I electronically filed the foregoing **Plaintiff Shawn Massey's Motion to Strike Defendants' Exhibits** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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RESPECTFULLY submitted this the 31st day of January, 2012.

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